

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

J. BRAD VOELZ
Warsaw, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD A. MITCHELL,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)

No. 43A04-0604-CR-220

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0308-FB-122

April 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Richard A. Mitchell was convicted of Robbery,¹ a class B felony, and Unlawful Possession of a Firearm by a Serious Violent Felon,² a class B felony, and was determined to be a Habitual Offender.³ Mitchell appeals, presenting the following restated issues:

1. Was there sufficient evidence to support the habitual offender determination?⁴
2. Did the trial court abuse its discretion when it ordered maximum, consecutive sentences?⁵

We affirm in part, reverse in part, and remand.

On the evening and in the early hours of August 11 and 12, 2003, Mitchell patronized Stimulators Gentlemen's Club (the club) in North Webster, Indiana. After leaving for a short while, Mitchell returned, brandished a large, semiautomatic handgun, and ordered Angela Richmond, the club's bartender, to give him all of the money in the register. At some point during the robbery, Amanda (last name unknown), one of the

¹ Ind. Code Ann. § 35-42-5-1 (West 2003).

² Ind. Code Ann. § 35-47-4-5 (West 2003).

³ Ind. Code Ann. § 35-50-2-8 (West 2003).

⁴ Mitchell also raises the issue of whether the trial court erroneously denied his motion for judgment on the evidence on the habitual offender allegation. We need not separately address this issue because our standard of review with regard to the denial of a motion for judgment on the evidence is essentially the same as that for a challenge to the sufficiency of the evidence. *Proffit v. State*, 817 N.E.2d 675 (Ind. Ct. App. 2004), *trans. denied*.

⁵ In his "Statement of Issues", Mitchell frames the issue presented as "Whether Mr. Mitchell's sentence is appropriate." *Appellant's Brief* at 3. In his "Table of Contents" and "Argument 3" section, however, he frames the issue as whether "[t]he trial court abused its discretion sentencing Mr. Mitchell to maximum consecutive sentences for two [c]lass B felonies because they were the result of a single episode of criminal conduct." *Id.* at 1, 20. Mitchell's argument addresses the latter issue and he makes no argument regarding the former based upon Ind. Appellate Rule 7(B). This issue, therefore, is waived. *Jackson v. State*, 735 N.E.2d 1146 (Ind. 2000).

club's employees, escaped and called the police. Upon noticing Amanda's absence, Mitchell quickly left through the back door. Nine days later, on August 21, 2003, Karlene Liechty, the club's disc jockey, observed Mitchell entering the club and knew him to be the man who robbed the club nine days earlier. Liechty informed Roy Mabie, the club's doorman, who contacted the police. Shortly thereafter, the police arrived, approached Mitchell, and escorted him outside for questioning. Once outside, Mitchell fled. As the police officers pursued Mitchell, a semiautomatic handgun fell from Mitchell's waist. The police officers apprehended Mitchell in short order and transported him to the Kosciusko County jail.

The State charged Mitchell with robbery as a class B felony, theft as a class D felony, and resisting law enforcement as a class A misdemeanor. The State subsequently dismissed the charges of theft and resisting law enforcement, charged Mitchell with unlawful possession of a firearm by a serious violent felon as a class B felony, and alleged Mitchell to be a habitual offender. Following trial, the jury found Mitchell guilty of robbery as a class B felony. In a bifurcated proceeding, the jury found Mitchell guilty of unlawful possession of a firearm by a serious violent felon as a class B felony. In a trifurcated proceeding, the State presented evidence regarding the habitual offender allegation. At the conclusion of the State's case-in-chief, Mitchell moved for judgment on the evidence, which was denied. The jury determined Mitchell to be a habitual offender. The trial court imposed a twenty-year sentence upon the robbery conviction, a twenty-year sentence upon the conviction of unlawful possession of a firearm by a

serious violent felon, a thirty-year enhancement upon the habitual offender determination, and ordered all sentences to run consecutively. Mitchell now appeals.

1.

Mitchell contends there was insufficient evidence to support the habitual offender determination. When reviewing a claim of insufficient evidence, we do not reweigh the evidence. *Ramsey v. State*, 853 N.E.2d 491 (Ind. Ct. App. 2006), *trans. denied*. Rather, we look to the evidence most favorable to the judgment along with all reasonable inferences drawn therefrom. *Id.* We will affirm a judgment if it is supported by substantial evidence of probative value. *Id.*

Pursuant to I.C. § 35-50-2-8(a), a person is a habitual offender if the finder of fact determines the State has proven beyond a reasonable doubt that the defendant has accumulated two prior unrelated felony convictions. A person has accumulated two prior unrelated felony convictions only if: the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and the offense for which the State seeks to have the person sentenced as a habitual offender was committed after sentencing for the second prior unrelated felony conviction. I.C. § 35-50-2-8(c). Failure to prove that the second felony was unrelated to the first felony in that it was committed subsequent to the date of the sentencing for the first requires that the habitual offender determination be vacated. *McManomy v. State*, 751 N.E.2d 291 (Ind. Ct. App. 2001).

The State's evidence included an information under cause number CR-81-30 alleging that Richard Allen Mitchell committed theft on or about April 8, 1981, and

documents establishing that he pleaded guilty to and was sentenced for theft under the same cause number on July 17, 1981. The evidence also included an information under cause number WCS-82-224 alleging that Richard A. Mitchell committed theft, and documents establishing that he was sentenced for theft under the same cause number on April 11, 1983. The information for cause number WCS-82-224 does not indicate the date the offense was committed, merely stating “[t]hat on or about the day of A.D., 19 . . .,” Mitchell committed theft. *Exhibits* ((State’s #8 through #34) (Defendant’s A, F, G, I, and J)) at State’s Exhibit 34. The only additional evidence the State presented was an abstract of judgment showing Mitchell was convicted of arson on November 6, 1987.

Absent evidence regarding the commission date of the second and third felonies, the State could not have proved the second or third felony was committed after the sentencing date of the first felony. *McManomy v. State*, 751 N.E.2d 291. Furthermore, our Supreme Court has declined to infer that a later felony was committed subsequent to the sentencing of a prior felony merely because there was a significant time span between the two. *See McCovens v. State*, 539 N.E.2d 26 (Ind. 1989) (insufficient evidence of required sequence where prior felony convictions spanned nearly twenty years); *see also McManomy v. State*, 751 N.E.2d 291 (insufficient evidence of required sequence where convictions spanned approximately two years).

To reiterate, the State presented no evidence regarding the date the second or third offense was committed. Rather, the State merely argued that “[t]he file mark [for the second felony] is on December 20, 1982 [and] . . . the documents speak for

themselves[,]” and that “[t]his is a classic case of an habitual criminal.” *Transcript* at 325, 326. We may not infer the second or third felony was committed subsequent to the sentencing for the first felony and, absent any other evidence regarding the date either was committed, there was insufficient evidence supporting the habitual offender determination. *McManomy v. State*, 751 N.E.2d 291. Accordingly, we vacate Mitchell’s thirty-year enhancement imposed upon the habitual offender determination. We note, however, that “the Double Jeopardy Clause does not prevent the State from re-prosecuting a habitual offender enhancement after conviction therefore has been reversed on appeal for insufficient evidence.” *Jaramillo v. State*, 823 N.E.2d 1187, 1191 (Ind. 2005), *cert. denied*, 126 S.Ct. 730 (Nov. 28, 2005).

2.

Mitchell contends the trial court abused its discretion when it ordered the sentences for the two class B felony convictions to run consecutively because “the two Class B felony convictions arose from a single episode of criminal conduct” and, thus, his sentence violates Ind. Code Ann. § 35-50-1-2 (West, PREMISE through 2006 2nd Regular Sess.). Mitchell’s contention is wholly without merit. I.C. § 35-50-1-2(c) provides:

except for crimes of violence, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

(emphasis supplied).

Mitchell was convicted of robbery as a class B felony and unlawful possession of a firearm by a serious violent felon as a class B felony. I.C. § 35-50-1-2(a)(12) designates class B felony robbery as a “crime of violence.” The trial court was not limited by I.C. § 35-50-1-2(c) in deciding whether to impose consecutive or concurrent sentences and, therefore, it did not abuse its discretion by imposing the former. Mitchell’s reliance upon *Massey v. State*, 816 N.E.2d 979 (Ind. Ct. App. 2004), is misguided. *See id.* (consecutive sentences erroneous where defendant’s convictions arose out of a single episode of criminal conduct and none of the crimes were crimes of violence). We affirm, therefore, the consecutive, twenty-year sentences imposed upon the convictions of robbery and unlawful possession of a firearm by a serious violent felon.

Judgment affirmed in part, reversed in part, and remanded.

KIRSCH, J., and RILEY, J., concur.